Supreme Court, U.S.
FILED

No. 00- 001473 MAR 22 2001

OFFICE OF THE CLERK

IN THE

# Supreme Court of the United States

ARTHUR GOLDSTEIN and
MEDCO ADMINISTRATORS, LTD.,

*Petitioners,*

*v.*

ELAINE L. CHAO, Secretary of Labor,
United States Department of Labor,

*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

## PETITION FOR A WRIT OF CERTIORARI

STUART WEINBERGER
GOLDBERG AND WEINBERGER LLP
*Attorneys for Petitioners*
630 Third Avenue
New York, New York 10017
(212) 867-9595

165967

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

85 pp

## QUESTIONS PRESENTED

What standard should be applied in determining what constitutes assets of an employee benefit plan governed by the Employee Retirement Income Security Act, 29 U.S.C. § 1001, *et seq.* ("ERISA")?

Do fees paid by employers to their collective bargaining representative constitute assets of an employee benefit fund?

Did the Second Circuit fail to apply the correct standard in determining whether the fees paid to Medco Administrators Ltd. ("Medco") were assets of the Solidarity of Labor Organizations Benefit Fund?

Did the Second Circuit deviate so far from the statutory standard to be applied in determining the conduct required to make an individual a fiduciary under ERISA as to call for an exercise of this Court's supervisory power?

Did the Second Circuit depart from the accepted and usual course of judicial proceedings, the Federal Rules of Evidence and Supreme Court precedent in affirming the district court's granting of summary judgment in favor of the respondent Secretary of Labor and against petitioners Medco and Arthur Goldstein ("Goldstein")?

In granting a permanent injunction against Goldstein, did the Second Circuit deviate so far from the remedies allowed under ERISA so as to call for an exercise of this Court's supervisory power?

## STATEMENT PURSUANT TO RULE 29.6

Petitioner Medco states that there is no parent or publicly held company that owns 10% or more of the corporation's stock.

## TABLE OF CONTENTS


| | Page |
|---|---|
| Questions Presented | i |
| Statement Pursuant to Rule 29.6 | ii |
| Table of Contents | iii |
| Table of Cited Authorities | vi |
| Table of Appendices | viii |
| Opinions Below | 1 |
| Statement of Jurisdiction | 1 |
| Statutory Provisions Involved | 1 |
| Statement of the Case | 1 |
| A. Medco's Role As The Collective Bargaining Representative Of Its Employer Clients With Respect To Local 947 of the Solidarity of Labor Organizations and the Solidarity of Labor Organizations Benefit Fund | 1 |
| B. Proceedings Below | 6 |
| Reasons for Granting the Writ | 8 |
| A. The "Governing Documents" Analysis Applied By The Second Circuit Is Ambiguous Thus Leading To Arbitrary And Inconsistent Holdings. | 10 |

*Contents*

*Page*

1. The Second Circuit failed to consider certain governing documents that support petitioners' position that Medco's fees are not plan assets. ..... 11

2. The Second Circuit failed to consider important aspects of the documents it did consider in its analysis. ..... 13

B. The Second Circuit's Approach In Determining Whether Medco's Fees Constituted Plan Assets Ignored Consideration Of The Functional Or Economic Realities Of The Parties' Relationships, Thus Resulting In A Conflict With The Approach Adopted By The Ninth Circuit. ..... 17

1. Local 947 understood and agreed that Medco's fees were not plan assets. ... 18

2. Medco's employer clients understood and agreed that Medco's fees were not plan assets. ..... 19

3. The Fund understood and agreed that Medco's fees were not plan assets. ... 19

C. The Second Circuit Misinterpreted And Misapplied The Law Regarding The Conduct That Makes An Individual A Fiduciary Under ERISA. ..... 21

*Contents*

*Page*

D. The Second Circuit Deviated So Far From The Standard To Be Applied In Consideration Of A Summary Judgment Motion As To Call For An Exercise Of This Court's Supervisory Power. . . . . 25

E. The Second Circuit Deviates So Far From The Remedies Allowed Under ERISA In Granting A Permanent Injunction Against Goldstein As To Call For An Exercise Of This Court's Supervisory Power. . . . . 26

Concluson . . . . . 28

## TABLE OF CITED AUTHORITIES

*Page*

**Cases:**

*Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986) ..... 25

*Beck v. Levering*, 947 F.2d 639 (2d Cir. 1991) .... 27

*Kayes v. Pacific Lumber Co.*, 51 F.3d 1449 (9th Cir. 1995) ..... 10, 17, 20

*Mertens v. Hewitt Associates*, 508 U.S. 248 (1993) ..... 22

*Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 131 (2000) ..... 25

*Trustees of the National Automatic Sprinkler Pension Fund v. Fairfield County Sprinkler Company, Inc.*, __ F.3d__ (2001 WL 246383 (2d Cir 2001) .... 20

**Statutes:**

28 U.S.C. § 1254(1) ..... 1

29 U.S.C. § 3(21) ..... 21, 24

29 U.S.C. § 186(c)(5)(B) ..... 20

29 U.S.C. § 302(c) ..... 20

29 U.S.C. § 404(a)(1)(A) ..... 7

*Cited Authorities*


| | *Page* |
|---|---|
| 29 U.S.C. § 404(a)(1)(B) | 7 |
| 29 U.S.C. § 405(a) | 7 |
| 29 U.S.C. § 406(a)(1)(D) | 7 |
| 29 U.S.C. § 406(b)(1) | 7 |
| 29 U.S.C. § 1001, *et seq.* | i, 1, 6 |
| **Rule:** | |
| Fed. R. Civ. 56(c) | 25 |
| **Other Authority:** | |
| 29 C.F.R. 2509.75-8 FR-16 | 9, 22, 24 |

## TABLE OF APPENDICES

*Page*

Appendix A — Opinion Of The United States Court Of Appeals For The Second Circuit Dated And Decided September 7, 2000 ..... 1a

Appendix B — Opinion And Order Of The United States District Court For The Southern District Of New York Dated August 10, 1998 ..... 3a

Appendix C — Final Judgment And Order Of The United States District Court For The Southern District Of New York Dated October 22, 1999 And Filed October 26, 1999 ..... 30a

Appendix D — Order Of The United States Court Of Appeals For The Second Circuit Denying Petition For Rehearing Dated And Filed December 22, 2000 ..... 35a

Appendix E — Relevant Statutes ..... 37a

Petitioners respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

## OPINIONS BELOW

The Second Circuit's opinion denying petitioners' appeal is unpublished and is attached as Appendix A.

The district court's opinion and order granting respondent's summary judgment motion is unpublished and set forth in Appendix B.

The district court's final judgment and order is unpublished and set forth in Appendix C.

## STATEMENT OF JURISDICTION

The Second Circuit's opinion denying petitioners' appeal was entered on September 7, 2000. The Second Circuit's opinion denying petitioners' petition for rehearing was entered on December 22, 2000 and is set forth in Appendix D. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## STATUTORY PROVISIONS INVOLVED

The Employee Retirement Income Retirement Security Act, 29 U.S.C. § 1001, *et seq*. The relevant provisions of ERISA are set forth in Appendix E.

## STATEMENT OF THE CASE

### A. Medco's Role As The Collective Bargaining Representative Of Its Employer Clients With Respect To Local 947 of the Solidarity of Labor Organizations and the Solidarity of Labor Organizations Benefit Fund

The Solidarity of Labor Organizations Benefit Fund ("Fund") is a jointly administered employee benefit fund created in order to provide medical benefits to employees of employers that are parties to collective bargaining agreements with Local 947 of the Solidarity of Labor Organizations ("Local 947").

Medco is a corporation organized under the laws of the State of New York in April 1991. From its inception through March 1996, Goldstein was the President of Medco.

Commencing in 1991, Medco began entering into agreements with employers, titled "Authorization of Collective Bargaining Representative." These agreements designated Medco as the employers' collective bargaining representative for purposes of their dealings with Local 947. The Authorization of Collective Bargaining Representative provides, at paragraph 1, as follows:

> 1. The undersigned Employer designates the undersigned Administrator [Medco] to serve as its representative for the purposes of collective bargaining with Local 947, Solidarity of Labor Organization (hereinafter Local 947) only with regard to the following matters:
>
> (a) To enter into an Associate Member Collective Bargaining Agreement (hereinafter the Local 947 Agreement) with Local 947, Solidarity of Labor Organization.
>
> (b) To negotiate with Local 947 the contribution amount required to provide single and/or family coverage for its employees in accordance with the rules and regulations of the Solidarity of Labor Organization Benefit Fund.
>
> (c) To negotiate with Local 947 the benefits to be provided by the Solidarity of Labor Organization Benefit Fund based upon the contribution amount agreed to in accordance with paragraph 1(b) (JA-847 at paragraph 1).[1]

---

1. "JA_" refers to the Joint Appendix filed with the Second Circuit Court of Appeals and page number thereat.

At the same time Medco began representing employers in connection with their collective bargaining with Local 947, Medco entered into an agreement with the Fund (JA-1071). This agreement provided, in pertinent part, that,

> Medco Administrators, Ltd., is a Health Benefit Consultant and Employer Representative and is a Collective Bargaining Representative ("Employer Representative") on behalf of various employers which have entered into Associate Membership Collective Bargaining Agreements with Local 947, Solidarity of Labor Organizations (JA-1071 at Second "Whereas" clause).

The collective bargaining agreements between Local 947 and the employers whom Medco was retained to represent required the employers to make monthly contributions to the Fund in order for the employers' employees to receive medical coverage through the Fund (JA-848 at paragraphs 5-9). Further, under the collective bargaining agreement, the employer was required to check-off from the wages of its covered employees from whom its had received written authorization, and remit to Local 947, union dues in the amount of $12.00 per month (JA-848 at paragraph 8).

On a monthly basis, Medco received a bill from Local 947 on behalf of each employer whom it represented. The bill listed each employee, the amount that was required to have been checked-off from the employees' wages as Local 947's dues and/or initiation fees, and the amount due from the employer to the Fund as the employer's contribution for its employees' participation in the Fund. The bill also described whether the employee receives single or family coverage based on the rate charged by the Fund. The bill indicated on the bottom to "Kindly Remit Welfare Check to: SOLO Benefit Fund" and to "Kindly Remit Dues Check to: SOLO Local 947" (JA-1073; JA-60 at paragraphs 78, 89).

Upon receipt of this monthly bill from Local 947, Medco prepared and sent a bill to the employers it was retained to represent. This bill reflected the amounts billed to the employer by the Fund and Local 947 as well as an additional amount added by Medco as the fee Medco charged the employer as its collective bargaining representative and in consideration for the services Medco performed in this capacity (JA-60 at paragraphs 79, 89; JA-1598).

Local 947 and the Fund solely determined the amounts that the employers were required to pay to Local 947 and the Fund. It is undisputed that, other than attempting to negotiate the lowest contribution rate possible for its employer clients, neither Medco nor Goldstein played any role whatsoever in the determination by the Fund of the amount the Fund billed Medco's employer clients for the provision of medical benefits. Similarly, It is undisputed that neither Medco nor Goldstein played any role whatsoever in the determination by Local 947 of the amount it required Medco's employer clients to check-off as union dues and initiation fees from their employees' wages and remit to Local 947.

Upon receipt of the bill from Medco, Medco's employer clients then sent to Medco the amounts required to be remitted to the Fund and Local 947 as well as Medco's fee. Medco deposited the entire amount in its bank account. Medco then issued separate checks to the Fund, reflecting the amount the Fund required from the employer in order to provide health benefits to the employer's employees, and to Local 947, reflecting the amount checked-off from the employees' wages as dues or initiation fees (JA-60 at paragraph 86, 89; JA-848 at paragraphs 9 and 10). Medco retained its fee for itself.

In connection with its role as the employer's collective bargaining representative, Medco performed the following important roles for its employer clients in exchange for the fees paid to it:

1. Medco negotiated with Local 947 for the Fund to provide the highest level of medical benefits, at the lowest contribution

rate, with respect to Medco's employer clients (JA-593 at p. 106, lns. 9 through p.108, ln.8; JA-847 at paragraph 2 (c)).

2. Medco received from the employers whom it represented both the contribution amount established by the Fund needed to provide health coverage and union dues and initiation fees, and then sent same, in the proper amounts, to the Fund and Local 947, respectively (A-848 at paragraph 86; A-848 at paragraphs 9 and 10).

3. Medco interfaced with the Fund and assisted Fund personnel in resolving any claims disputes involving the employees of employers whom Medco represented. This would involve speaking directly with the employee involved and interacting with the Fund staff (JA-593 at p. 25, lns. 8-25, p. 26. lns. 2-5, p. 95, ln. 13 through p. 100, ln. 9).

4. Medco ensured that all contributions its employer clients were required to make were timely made and agreed to indemnify the Fund for any delinquent contributions (JA-1071 at paragraph "FIRST" ).

5. Medco agreed to indemnify the Fund in the event a collective bargaining agreement was terminated without approval by the Fund, in which case Medco may be held liable to the extent the claims paid exceeded the total amount of contributions received by the Fund (JA-1071 at paragraph "Seventh").

6. Medco guaranteed the accuracy of the information provided by its employer clients in their application to participate in the Fund (JA-1071 at paragraph "FIFTH"). Medco also agreed to indemnify the Fund should it suffer any losses in the event employees are enrolled in the Fund who do not meet the definition of an eligible "employee" under the Fund's Trust Agreement.

7. Medco prepared a booklet for its employer clients which described both Medco's role and relationship to the employers as well as the Fund's plan of benefits (JA-888; JA-593 at p. 99, lns. 14-25, p. 100, lns. 2-9).

8. Medco agreed to establish a reserve fund of $100,000 on behalf of its employer clients, to be used to indemnify the Fund to, among other things, "assure the prompt remittance of employer contributions to the Fund when due" (JA-1071 at paragraph "FIRST").

9. Medco was responsible for acting as the agent of its employer clients for all purposes related to their participation in the Fund (JA-848 at paragraphs 1 and 12; JA-847 at paragraph 2 (c)).

**B. Proceedings Below**

The jurisdiction of the district court was invoked under ERISA, 29 U.S.C. § 1001, *et seq.*

The Secretary of Labor instituted this action alleging that the fees paid to Medco were assets of the Fund. The Secretary of Labor further alleged that, by virtue of the fact that Medco and Goldstein had the ability to establish Medco's fees, Medco and Goldstein exerted sufficient discretionary control over plan assets to be considered fiduciaries of the Fund. The Secretary of Labor alleged that the retention of these fees by Medco constituted a breach of the fiduciary duty owed by Medco and Goldstein to the Fund. The Secretary of Labor sought an order requiring Medco and Goldstein to disgorge all fees paid to Medco by its employer clients.

There is no dispute that neither Goldstein nor Medco held any title or position, such as plan trustee, administrator or investment advisor, which, by its very designation, would confer fiduciary status upon either. Accordingly, Medco or Goldstein can only be liable if the fees paid to Medco by its employer clients were plan assets and Medco and Goldstein were deemed to be fiduciaries of the Fund based upon their exercise of discretion or control over the disposition of plan assets. If Medco's fees are not plan assets, the setting of Medco's fees does not constitute the exercise of discretionary control over plan assets. Accordingly, neither Medco nor Goldstein could then be considered fiduciaries of the Fund. As neither Medco nor Goldstein would then be considered fiduciaries of the Fund,

neither can be held to have owed any fiduciary duty to the Fund or to have breached any fiduciary duty to the Fund.

Neither ERISA nor the regulations promulgated thereunder contain a definition of the term "plan assets" applicable to this case. Nevertheless, the district court held, by way of summary judgment in favor of respondent, that the fees paid to Medco by employers, which had designated Medco as their collective bargaining representative, constituted assets of the Fund. In concluding that Medco's fees are plan assets, the district court employed both a "governing documents" test and a "functional" and economic realities approach. The district court further held that, by virtue of the fact that Medco and Goldstein had the ability to establish Medco's fees, Goldstein and Medco were fiduciaries of the Fund, and that by retaining the fees paid to Medco's by its employer clients, petitioners breached the fiduciary duty they owed to the Fund and engaged in prohibited transactions in violation of ERISA Sections 406(a)(1)(D), 406(b)(1), 404(a)(1)(A), 404(a)(1)(B), and Section 405(a). Consequently, the district court held that Goldstein and Medco were liable to the Fund in the full amount of the fees paid by employers to Medco, a sum totaling $9,525,493.16 plus $2,112.55 interest for each date after June 9, 1999, as restitution to the Fund. The district court further permanently enjoined Goldstein from ever providing any services, as an employee, consultant, vendor or otherwise, to any employee benefit plan.

The Second Circuit affirmed the district court's granting of respondent's summary judgment motion. The Second Circuit rejected petitioners' argument that the fees paid to Medco by its employer clients were not Fund assets "substantially for the same reasons stated in Judge Wood's Opinion and Order . . . analyzing the terms of the documents governing the Fund" (App. B). The Second Circuit also rejected petitioners' argument that substantial factual questions exist which precluded granting respondent's motion for summary judgment. The Second Circuit further denied petitioners' request for a rehearing.

The petition for a writ of certiorari followed.

## REASONS FOR GRANTING THE WRIT

The extension by the Second Circuit of the definition of a "plan asset" to include the fees paid to Medco by employers who designated Medco as their collective bargaining representative raises important questions of federal law that must be decided by this Court. The reasons that support granting petitioners' writ of certiorari are summarized as follows:

1. There exists no consistent or logical standard for determining what constitutes a plan asset. As described *infra*, the "governing documents" analysis applied by the Second Circuit is arbitrary and leads to the inconsistent and irrational definition of plan assets under ERISA.

2. In determining whether Medco's fees constituted assets of the Fund, the Second Circuit considered only the governing documents. The Second Circuit never explained what constitutes the governing documents or what weight was to accorded any particular document.

3. The standard employed by the Second Circuit in determining whether Medco's fees constituted assets of the Fund ignores the functional or economic realities of the parties' relationships. In not considering these factors, the Second Circuit rejected the standard applied by the Ninth Circuit. There thus exists a conflict between the Ninth and Second Circuits as to the test to apply in determining whether monies constitute plan assets.

The consideration of the functional or economic realities of the parties' relationships is essential in determining whether certain monies constitute plan assets. In fact, the respondent Secretary of Labor urged the Second Circuit to adopt this very approach, combining both the governing documents analysis and the functional or economic realities approach, to determine whether Medco's fees are plan assets. In ignoring these relevant factors, the Second Circuit fails to consider the best evidence of the parties' intent and understanding. Accordingly, the correct standard that should be applied combines a consideration of

the governing documents test and the functional or economic realities approach. This approach is imperative in light of the fact that ERISA does not contain a definition of a plan asset as well as in light of the arbitrary and inconsistent results that stem from application of the governing documents test.

4. The Second Circuit deviated so far from the statutory standard to be applied in determining the conduct required to make an individual a fiduciary under ERISA as to call for an exercise of this Court's supervisory power. In holding that Goldstein was a fiduciary, and thus liable to make restitution of all fees paid to Medco from its employer clients, the Second Circuit ignored the express terms of ERISA as well as clear judicial precedent and Department of Labor Regulations which provide that an individual may only be liable as a fiduciary with respect to instances in which he acted as a fiduciary (29 C.F.R. 2509.75-8 FR-16, provides that "The personal liability of a fiduciary who is not a named fiduciary is generally limited to the fiduciary functions which he or she performs with respect to the plan").

In the instant matter, Goldstein may only be held liable as a fiduciary with respect to the instances in which he set the fees paid by employers to Medco. Notwithstanding, Goldstein was held to be a fiduciary with respect to each and every fee paid by employers to Medco despite the fact that the record does not contain evidence that Goldstein set the fees in each instance for which he was held liable.

5. The standard employed by the Second Circuit in determining whether Medco's fees constituted assets of the Fund will inevitably result in fees charged by attorneys and multi-employer associations for representing employees being considered plan assets.

6. This case raises the important question of what standard should be applied in granting summary judgment and whether the Second Circuit correctly applied this standard. In granting summary judgment, the Second Circuit substantially deviated from established judicial precedent.

7. This case raises the important question of what standard should be applied in granting a permanent injunction barring an individual from being involved with an ERISA benefit plan and whether the Second Circuit correctly applied this standard. In granting summary judgment, the Second Circuit substantially deviated from judicial precedent on when a permanent injunction should be granted.

**A. The "Governing Documents" Analysis Applied By The Second Circuit Is Ambiguous Thus Leading To Arbitrary And Inconsistent Holdings.**

The district court employed two (2) approaches advanced by several other courts in attempting to determine whether or not particular Medco's fees constituted plan assets. The district court considered whether the fees paid by employers to Medco as their collective bargaining representative constituted assets of the Fund from the perspective of both the "governing documents" and based upon a "functional perspective" analysis (JA-1663-1668). In affirming the district court's finding that the fees paid to Medco are plan assets however, the Second Circuit relied "substantially for the same reasons stated in the district court's Opinion and Order . . . analyzing the terms of the documents governing the Fund" (App. A). The Second Circuit thus rejected the consideration of the functional perspective approach utilized by the district court as well as the Ninth Circuit in *Kayes v. Pacific Lumber Co.*, 51 F.3d 1449, 1467 (9th Cir. 1995).

In the subject case, neither the trust agreement nor any of the other relevant documents expressly state that Medco's fees are plan assets. Despite this fact, the Second Circuit, in determining whether Medco's fees constituted plan assets, looked only to certain governing documents to determine if Medco's fees were plan assets.

The standard applied by the Second Circuit in determining whether Medco's fees constituted plan assets is inherently flawed. The governing documents approach is flawed in that it provides no guidance as to the documents the Court must consider or the weight to be given any particular document.

The Court is thus free to select certain documents to consider, while ignoring others, or to consider certain provisions contained in documents while ignoring other equally relevant provisions contained in the same documents. The Second Circuit decision to consider only certain documents, while ignoring others, is arbitrary and leads to the inconsistent and incorrect definition of plan assets under ERISA.

The Second Circuit's approach is also flawed in that it fails to consider the functional or economic realities of the parties' relationships in its analysis. In omitting consideration of these factors, the Second Circuit applied a different standard than applied by the Ninth Circuit in resolving the question of whether certain monies constitute plan assets. Further, in rejecting this approach, the Second Circuit rejected the standard employed by the district court and urged by the Secretary of Labor.

The flaws inherent in the governing documents approach are described below:

**1. The Second Circuit failed to consider certain governing documents that support petitioners' position that Medco's fees are not plan assets.**

The district court did not consider the Authorization of Collective Bargaining Representative in its review of the governing documents. As the Second Circuit affirmed the district court's holding that Medco's fees are plan assets "substantially for the same reasons stated in the district court's Opinion and Order . . . analyzing the terms of the documents governing the Fund," it is presumed that the Second Circuit similarly did not consider the Authorization of Collective Bargaining Representative in reaching its decision.

The Authorization of Collective Bargaining Representative, entered into between Medco and its employer clients, is the seminal governing document that should have been considered by the district court. It is this document that created and defined Medco's relationship as the employers' collective bargaining representative. The fact that the Second Circuit ignored this

document exposes a fundamental flaw in the approach adopted by the Second Circuit. This omission is especially significant in light of the fact that the Authorization of Collective Bargaining Representative lends important support to petitioners' position that Medco's fees are not plan assets.

The significance of the Authorization of Collective Bargaining Representative to the question of whether Medco's fees are plan assets cannot be overstated. The Authorization of Collective Bargaining Representative states that, as an agent of the employer, Medco was authorized "[t]o negotiate with Local 947 regarding the contribution amount required to provide single and/or family coverage for its employees . . ." (JA-847 at paragraph 1 (b)) as well as "[t]o negotiate with Local 947 the benefits to be provided by the Solidarity of Labor Organization Benefit Fund upon the contribution amount agreed to in accordance with paragraph 1 (b)" (JA-847 at paragraph 1 (c)). The Authorization of Collective Bargaining Representative goes on to state that,

> 2. The Employers contribution amount agreed to in accordance with paragraph 1(b), shall be paid to the Administrator [Medco] on the 15th day of the month prior to the month for which the contributions are due. In addition to the Solidarity of Labor Organization Benefit Fund contributions, the payment shall include Local 947's Associate Membership fees and/or initiation fees, checked off pursuant to written authorization, and the Administrator's [Medco's] administration fee (JA-847 at paragraph 2).

The Authorization of Collective Bargaining Representative thus clearly establishes that Medco's fee was intended to be separate and distinct from the contributions that the Fund required employers pay to it for the provision of health benefits to the employer's employees. This further establishes that Medco's employer clients never believed that Medco's fee was

to be paid to the Fund. Rather, the Authorization proves that the employers understood that Medco's fee was to be the property of Medco.

Further, the Authorization of Collective Bargaining Representative at paragraphs 1(b) and (c), thus clearly contemplates a "contribution amount" which is to be charged each employer by the Fund, and which is required to be paid in order for the Fund to provide benefits to the employer's employees. Paragraph 2 states that the employer is required to send this "contribution amount" to Medco, on a monthly basis, for remittance by Medco to the Fund. Paragraph 2 further provides that "[I]n addition" to the Solidarity of Labor Organization Benefit Fund contributions (i.e., the "contribution amount"), the employer shall pay to Medco, on a monthly basis, the Local 947's fees as well as Medco's fee.

These important aspects of the document, which clearly indicate that Medco's fees are separate and distinct from the "contribution amount" required by the Fund for the provision of medical benefits, were ignored by the district court and the Second Circuit under the amorphous "governing documents" test.

**2. The Second Circuit failed to consider important aspects of the documents it did consider in its analysis.**

The documents considered by the Second Circuit contain numerous provisions that lend support to petitioner's position that Medco's fees are not plan assets, including the collective bargaining agreement between Local 947 and the employers. As the district court did not consider these provisions, and the Second Circuit's decision is based on substantially the same grounds as the district court's decision, it is presumed that the Second Circuit similarly failed to consider these provisions. The failure to consider these provisions further points out the flaw inherent in the Second Circuit's approach.

The collective bargaining agreement, at paragraph 5, provides that "[t]he Employer agrees that contributions to the SOLO Health and Welfare Fund shall be made . . . in accordance with the schedule of Benefits and the *contribution amount* agreed to between Medco and the Employer" (JA-848 at paragraph 5 ). It cannot be argued that this provision gave Medco and the employers the right to set the amount of contributions required by the Fund to be paid to it in order to provide health insurance. Under this interpretation, Medco and the employer could, thus, could set this amount at any amount they chose, even zero. The correct interpretation of the meaning of this provision is that Medco and the employer (both of whom were party to the Associate Membership Agreement) had to agree between themselves upon the amount the employer would commit itself to pay to the Fund in order for the Fund to provide health insurance to the employer's employees. One of the reasons for this may well be that Medco, as the employer's agent, had to agree to indemnify the Fund for the employers' failure to pay contributions to the Fund (JA-1071 at paragraph "FIRST").

Further, the use of the term "contribution amount" in this context is consistent with the manner in which that term is utilized in the Authorization of Collective Bargaining Representative. In that document, the term "contribution amount" was shown to refer to the amount required to be paid by the employer to the Fund for the provision of health benefits to the employer's employees.

Moreover, the collective bargaining agreement, at paragraph 8, provides that "[t]he employers contributions shall be made to Medco and shall include the monthly contributions to the SOLO Health and Welfare Fund, Local 947, Solidarity of Labor Organizations Associate membership fees in the amount of twelve (12) dollars, per covered employee per month and a service fee payable to Medco" (JA-848 at paragraph 8). Thus, Medco's fee is set out as being separate from the amount the employer is required to send to the Fund for the provision of medical benefits.

In addition, paragraph 6 of the collective bargaining agreement provides as follows: "6. The amount of the *Employer's contribution* to the SOLO Health and Welfare Fund may be changed by a decision of the Board of Trustees of the SOLO Health and Welfare Fund," upon thirty (30) days written notice to the employer and Medco (emphasis added) (JA-848 at paragraph 6). The same term, *Employer's contribution*, is used in both paragraphs 6 and 8. Applying the meaning the district court gave the term *Employer's contribution* in paragraph 8 (as including the "monthly contributions to the SOLO Health and Welfare Fund," Local 947's dues and Medco's fees), to paragraph 6 would mean that the Fund's Board of Trustees have the right to unilaterally alter both the amount of dues paid to Local 947 as well as Medco's fees. Certainly, this was not agreed to by the parties.

Further support for petitioners' position that Medco's fee were never meant to be a plan asset is found in paragraph 9 of the collective bargaining agreement, which reads as follows: "9. Medco agrees to remit the appropriate monthly amount to the SOLO Health and Welfare Fund within thirty (30) days of receipt of the *Employer's contribution*" (JA-848 at paragraph 9). If, as the district court concluded, the term "*Employer's contribution*" refers to the entire amount received by Medco from the employers, including Medco's fees, why would paragraph 9 require that Medco only remit "the appropriate amount" from the *Employer's contribution*?

Still further support for petitioner's position that Medco's fee was never meant to be a plan asset is found in paragraph 10 of the collective bargaining agreement, which reads as follows: "10. On the first day of the month following receipt of the monthly contributions by the SOLO Health and Welfare Fund, and the Local 947 Solidarity of Labor Organizations Associate Membership fees, employees of the Employer on whose behalf contributions are made will be entitled to benefits . . ." (JA-848 at paragraph 10). Paragraph

10 describes the Fund's "monthly contributions" as being the amount required to be paid by Medco to the Fund. Local 947's dues is referred to separately and no mention is made at all of the receipt by the Fund of Medco's fees as being a condition of providing health insurance. Thus, in paragraph 10, the term "monthly contributions" refers only to the amounts paid to the Fund.

Similarly, paragraph 11 of the collective bargaining agreement provides that an employee's benefits will cease on "the date contributions required on the part of the employee is due and unpaid . . ." (JA-848 at paragraph 11). No mention is made of the receipt by the Fund of Medco's fees as being a condition of providing health insurance.

Paragraph 12 of the collective bargaining agreement also provides as follows:

> 12. In all matters pertaining to this Agreement, Medco shall be acting as the agent of the Employer, and a failure by Medco to remit the Employer's contributions to the SOLO Health and Welfare Fund shall be deemed a failure by the Employer to comply with the contribution requirement set forth above.

(JA-848 at paragraph 12). If, as the district court concluded, the term *Employer's contribution* in paragraph 8 includes the monthly contributions to the SOLO Health and Welfare Fund as well as Local 947's dues and Medco's fees, then, paragraph 12 must be read as meaning that if Medco does not remit to the SOLO Health and Welfare Fund the entire "Employer contribution," coverage will be terminated. This would, according to the district court's analysis, include both Local 947's dues and Medco's fees. There is no evidence to support the contention that payment of union dues is a condition of medical coverage, yet this is the inescapable conclusion of this approach.

### B. The Second Circuit's Approach In Determining Whether Medco's Fees Constituted Plan Assets Ignored Consideration Of The Functional Or Economic Realities Of The Parties' Relationships, Thus Resulting In A Conflict With The Approach Adopted By The Ninth Circuit.

In considering whether monies constitute plan assets, the Ninth Circuit has adopted a "twofold functional test . . . (1) whether the item in question may be used to the benefit (financial or otherwise) of the fiduciary, and (2) whether such use is at the expense of the plan participants or beneficiaries." *Kayes v. Pacific Lumber Co.*, 51 F.3d 1449, 1467 (9th Cir. 1995). The Second Circuit did not follow this approach and did not consider the functional and economic realities of their relationships. This test, however, is an essential part of the analysis performed by a court. As the law does not contain a definition of a plan asset, it is necessary that a court consider whether the parties' intended particular monies to be considered plan assets. The Second Circuit, in employing the governing documents test, attempted to determine whether these documents defined the amounts in question as plan assets. Among the best evidence of the parties' intent, however, are the functional and economic realities of their relationship. The flaw in the Second Circuit's failure to apply a functional test is readily apparent in that it ignores significant and relevant factors that must necessarily be examined in order to ascertain the parties' intent as to whether Medco's fees are considered plan assets. Consequently, the application of this limited approach by the Second Circuit results in an inconsistent and incorrect conclusion as to what is considered a plan asset.

The correct standard that should be applied combines a consideration of the governing documents test and the functional or economic realities approach. The Supreme Court must adopt an approach that considers the governing documents that establish the parties' relationship in light of the understanding of the parties involved as to whether Medco's fees constituted

assets of the plan as well as the reality of the manner in which each party acted. The flaw in the Second Circuit's use of only certain governing documents is demonstrated by that Court's failure to examine the functional and economic relationship among the employers, Medco, Local 947 and the Fund.

**1. Local 947 understood and agreed that Medco's fees were not plan assets.**

Edmund Perez ("Perez") was both a Trustee of the Fund and the President of Local 947 at all relevant times. As President of Local 947, Perez was aware of the terms of the collective bargaining agreement entered into between Medco, the employers Medco represented and Local 947. As described *supra*, the collective bargaining agreement specifically stated that the employer's monthly payment to Medco would, include, "a service fee payable to Medco" in addition to the "monthly contributions to the SOLO Health And Welfare Fund" and Local 947 union dues (JA-848 at paragraph 8). Accordingly, Local 947 unquestionably understood and agreed that Medco's fees are not assets of the Fund.

Further, to accept the Second Circuit's decision, that the total payment made by the employers to Medco constituted plan assets, would lead to the conclusion that Local 947 entered into a collective bargaining agreement which provided that its union dues and initiation fees, checked-off from the wages of its associate members, must also be considered assets of the Fund. Under the reasoning adopted by the Second Circuit, all sums sent by employers to Medco are plan assets. However, included among these amounts, in addition to contributions required by the Fund and Medco's fees, were Local 947 dues checked-off from employees' wages and required to be remitted to Local 947. According to the analysis adopted by the Second Circuit, the union dues sent by employers to Medco and forwarded from Medco to Local 947 are plan assets. Thus, Local 947 officials or even payroll clerks that accepted the union dues and deposited these amounts into Local 947's account are no less Fund fiduciaries than Medco and Goldstein by virtue of the fact they

exercised discretionary control over plan assets. These individuals would then be personally liable to make restitution to the Fund for the union dues and initiation fees they accepted.

Moreover, it would also have been illegal for union dues and initiation fees checked-off from employees' wages to be remitted to the Fund as monies deducted from employee's wages are held in trust for remittance to the union. Further, the Complaint does not allege that Local 947 was required to disgorge the union dues they received under the theory that they are plan assets. The Consent Judgment, which Local 947 entered into to resolve the claims raised against it, with the approval of the district court, did not require that Local 947 pay the union dues to the Fund. The Second Circuit's approach of only looking at governing documents fails to take into the account the practical reality that if Medco's fees are plan assets, then Local 947's dues and initiation fees must also be considered plan assets. This inescapable conclusion stems from the Second Circuit's analysis and serves to point out the inherent flaw in the Second Circuit's approach.

**2. Medco's employer clients understood and agreed that Medco's fees were not plan assets.**

Medco's fee is clearly disclosed as being separate and apart from the "contribution amount" negotiated by Medco on behalf of its employer clients and required by the Fund to provide benefits to the employer's employees. Thus, a review of this Authorization of Collective Bargaining Representative establishes, beyond any doubt, that Medco's employer clients did not consider Medco's fee to be the property of any entity other than Medco, and that it was intended to be paid to Medco for its services performed for the employer.

**3. The Fund understood and agreed that Medco's fees were not plan assets.**

The Fund set the contribution rate it required employers to pay in order for their employees to be entitled to receive medical benefits. This amount was designated by the Fund in its bill as

being separate and apart from any amount Medco charged its clients. The Fund only requested or required Medco's employer clients to pay the contribution amount it established and clearly understood and agreed that it was not entitled to any portion of the fee paid by Medco's clients to Medco.

Further, even had Medco tendered to the Fund the fees paid to Medco by employers who it represented, the Fund would not have been permitted to accept these monies as they would have exceeded the contribution level set by the Trustees. The Fund billed each employer a certain amount, as set forth on the monthly invoices for each employer sent to Medco. The Trustees would have been committing a breach of their fiduciary duty by accepting any amounts in excess of the contribution rate established and billed by them. In fact, the Second Circuit recently issued a decision in *Trustees of the National Automatic Sprinkler Pension Fund v. Fairfield County Sprinkler Company, Inc.*, __ F.3d__ (2001 WL 246383 (2d Cir 2001) in which it held that an employee benefit fund cannot accept monies, and the employer cannot pay monies to the benefit fund, under Section 302(c) of the Labor Management Relations, 29 U.S.C. § 186(c)(5)(B), where there is no agreement which provides for the payment of contributions. The holding in that case is inconsistent with the Second Circuit holding that Medco's fees must be paid to the Fund. It is illogical for the Second Circuit to require petitioners to pay to the Fund amounts representing Medco's fees that, had Medco tendered these amounts to the Fund at the time Medco received them, the Fund would not have been permitted to accept.

Applying the functional test approved by the Ninth Circuit, as the Fund never intended to be the recipient of Medco's fees, nor entitled to receive them, the retention of Medco's fees by Medco itself was not "at the expense of plan participants or beneficiaries." *Kayes v. Pacific Lumber Co.*, 51 F.3d at 1467.

Under the Second Circuit's reasoning, lawyers and other employer representatives, including multi-employer associations, could be fiduciaries. Lawyers and other

representatives typically negotiate contracts and settlements with employee benefit funds and charge fees for their services. Fees that an attorney receives from his client for settling a case involving a claim by a benefit fund that his client owes fund contributions to could be a plan asset. Clearly, Congress never intended that all fees paid to employer representatives are plan assets.

The Second Circuit's decision to reject the functional realities test adopted by the Ninth Circuit, and supported by the respondent Department of Labor, results in the formulation of an illogical test, with monies being considered plan assets which none of the parties, including the Fund and the participants of the Fund, intended and agreed were plan assets. Examining the functional realities, along with the governing documents, is the only way to reach a fair and consistent conclusion as to whether certain amounts constitute plan assets.

Therefore, it is important that the Supreme Court establish a standard that adopts the economic and practical realities of the parties' relationship and which is consistent with ERISA and the Labor Management Relations Act, and which reflects what the parties intended.

The Secretary of Labor clearly objected to Medco receiving fees from its employer clients. Since this arrangement does not violate any federal statute or regulation, the Secretary of Labor was compelled instead to construct a "bootstrap" theory by which Medco's fees are defined as plan assets despite the fact that the majority of the provisions of the governing documents do not support this conclusion as well as the reality of the parties' relationships.

### C. The Second Circuit Misinterpreted And Misapplied The Law Regarding The Conduct That Makes An Individual A Fiduciary Under ERISA.

ERISA defines an individual to be a fiduciary "to the extent" he exercises discretionary authority or control regarding the disposition of plan assets. ERISA Section 3(21). Courts have

held that "[u]nder this definition, a person may be an ERISA fiduciary with respect to certain matters but not others, for he has that status only "to the extent" that he has or exercises the described authority or responsibility *Mertens v. Hewitt Associates*, 508 U.S. 248 (1993). The Secretary of Labor also has adopted regulations, under, 29 C.F.R. 2509.75-8 FR-16, which provides that "The personal liability of a fiduciary who is not a named fiduciary is generally limited to the fiduciary functions which he or she performs with respect to the plan." In this case, however, the Second Circuit has found that Goldstein is a fiduciary in all instances in which Medco collected a fee even where there is no evidence that he acted as a fiduciary in each and every such instance.

The district court held that

> [b]ecause the Court finds that the amount of the employers' contributions paid to Medco constitute assets of the Fund and because defendants had set the total sum of the contributions employers had to pay (over and above the coverage rate set by the Fund and the union membership fee set by Local 947) the Court further concludes that defendants are fiduciaries within the meaning of ERISA.

(JA-1668). The district court held Goldstein was personally liable to pay to the Fund all fees paid by employers to Medco (JA-1748). Since Goldstein was not a named fiduciary of the Fund, however, Goldstein could only be held to be a fiduciary "to the extent" he acted as a fiduciary *in a particular case*. In requiring that Goldstein be personally liable to pay to the Fund all fees paid by employers to Medco, the district court concluded that Goldstein *personally* set Medco's fee in each and every instance in which Medco collected a fee.

In their argument to the Second Circuit, the petitioners stated that there was no evidence that Goldstein set the fee in each and every case and that Goldstein could only be liable

for the fees that he set. The only evidence before the District Court, and upon which the Secretary of Labor relied upon, that Goldstein set the fees paid by employers to Medco, was contained in Goldstein's deposition testimony. The relevant portion of the transcript cited by the Secretary of Labor is as follows:

> Q. Who determined what the additional amount would be for what's referred to in that paragraph as the service fee payable to Medco?
>
> A. Who would determine that?
>
> Q. Yes.
>
> A. Medco?
>
> Q. And who at Medco would have determined that *at that time*? (emphasis added).
>
> A. Me.

It is entirely the answer provided by Goldstein, "Me," to the question, "[a]nd who at Medco would have determined that [Medco's fee] *at that time*?" [emphasis added], upon which the Secretary of Labor argued, and the district court held, that Goldstein personally determined the amount of Medco's fee for the entire period for which he was held liable, March 1, 1991 through February 28, 1997 and, accordingly, that he was liable to pay to the Fund all fees paid to Medco during this period.

The question which arises is what time frame was the questioner referring to when the question was asked "[a]nd who at Medco would have determined that [Medco's fee] *at that time*?" [emphasis added]. Moreover, when an attorney asks a witness to recall events as they existed at a particular time ("*at that time*?"), it is a discrete time period they are referring to, at the exclusion of other periods of time. In such a case, the answer provided by Goldstein is limited to the parameters of the question and may not be read to indicate that he set Medco's fee for any period of time other than that period posed in the

question. At minimum, an ambiguity exists as to the time frame the questioner was referring to, as well as the time frame that the deponent, Goldstein, believed he was being asked. In addition, Goldstein's deposition was on July 18, 1996. Goldstein, however, was found liable through February 28, 1997, a period after his deposition. There is no evidence at all about Goldstein setting the fees after his deposition.

What is beyond argument is that Goldstein's answer to the question does not indicate that Goldstein set Medco's fees at all times and in each and every instance. The petitioners believe that ERISA, under Section 3(21), and the Department of Labor Regulations, under, 29 C.F.R. 2509.75-8 FR-16, require that in order for a party to be a fiduciary, the party must have acted as a fiduciary in that instance. In the case at bar, the Second Circuit has found that Goldstein is a fiduciary in all instances because he may have set the fees in some instances. This holding by the Second Circuit is in contradiction to ERISA and the Department of Labor Regulations.

The Second Circuit also acted in contradiction to prior holdings of this Court that summary judgment is inappropriate when there are genuine triable issues of fact that can only be resolved by the trier of fact. At minimum, there are triable issues of fact as to whether Goldstein set Medco's fees in all instances for which he was held liable. The Secretary of Labor cannot use a motion for summary judgment to avoid being required to prove that Goldstein set Medco's fees in each and every instance. Goldstein cannot be held liable, and cannot be required to make restitution of Medco's fees, with respect to instances in which he did not set Medco's fees.

**D. The Second Circuit Deviated So Far From The Standard To Be Applied In Consideration Of A Summary Judgment Motion As To Call For An Exercise Of This Court's Supervisory Power.**

Summary judgment is appropriate when there is "no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." Fed. R. Civ. 56(c). "The inquiry performed is the threshold inquiry of determining whether there is a need for a trial-whether, in other words, there are any genuine issues that can be properly resolved only by a finder of fact because they may reasonably be resolved in favor of either party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). A material fact is one that would affect the outcome of the litigation. *Id.* at 248. Further, in considering a motion for summary judgment, the "evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in [its] favor." *Id.* at 255. "Credibility determinations, the weighing of evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge." *Id.* at 255. In making the inquiry, a court "must review the record as a whole." (citation omitted). *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 131, 150-151 (2000).

As indicated above, the petitioners contend that the Second Circuit did not examine "the record as a whole." *Id.* There are several documents, which were described *supra*, that indicate that the Medco's fees were not plan assets. If these documents are examined as a part of the record, summary judgment must not be granted. The Second Circuit, however, may never have even examined these documents because it never indicated or defined the term "governing documents." It is not clear what documents the Second Circuit believed are governing documents or documents that it examined.

In addition, the petitioners contend that the Second Circuit did not draw all reasonable inferences in favor of petitioners regarding whether Medco's fees constitute plan assets. This includes, as discussed, *supra*, the fact that the Second

Circuit ignored several documents and ignored provisions in several documents, which it considered, that indicate that Medco's fees were for services it rendered to the employer and not plan assets. These documents create a reasonable inference that Medco's fees were not plan assets.

**E. The Second Circuit Deviates So Far From The Remedies Allowed Under ERISA In Granting A Permanent Injunction Against Goldstein As To Call For An Exercise Of This Court's Supervisory Power.**

The District Court ordered broad and sweeping permanent injunctive relief against Arthur Goldstein and Medco. Petitioners argued to the Second Circuit that the petitioners' conduct was not so egregious as to require a permanent injunction. The petitioners further argued that, at minimum, there were triable issues of fact as to whether their conduct was egregious. The Second Circuit rejected the petitioners' arguments.

The injunction prevents petitioners from serving as fiduciaries, consultants, vendors, or service providers. This relief enjoined Goldstein and Medco from, *inter alia*, ever "receiving compensation . . . or anything of value from an employee benefit plan"; "[s]oliciting on behalf of himself or others, any person" involved in an employee benefit plan concerning the operation of the plan; "making any recommendation to, providing any advice to" any person involved in an employee benefit plan, concerning the employee benefit plan" (JA-1750-1). This injunction, in effect, bars Goldstein from being employed by any entity that performs services for any employee benefit plan or from engaging in any transactions involving an employee benefit plan.

Since an injunction, such as one against Goldstein, virtually bars an individual from being employed in a field which was his livelihood, the Supreme Court must adopt a standard that only egregious violations of ERISA warrant a permanent injunction. The Supreme Court should hold that there must be a hearing held before a permanent injunction is issued where

there are triable issues of fact regarding whether an individual engaged in such egregious conduct.

In the instant case, a Consent Judgment was entered against the Fund's Trustees and other fiduciaries as well as with officials of Local 947, named as defendants in the Complaint. This Consent Judgment placed no bar whatsoever from them acting as fiduciaries or Trustees with ERISA in the future. Perhaps more remarkably, the Consent Judgments do not remove any of these individuals from continuing in their roles as Trustees and fiduciaries on behalf of the Fund (JA 1631). Goldstein and Medco's conduct, thus, cannot be so egregious that it warrants a lifetime ban where the Consent Judgments do not require the removal of individuals who served as Trustees and fiduciaries.

Moreover, Goldstein and Medco did not hide their conduct. Medco's right to its fees was clearly set forth in written agreements, numerous invoices and was clearly understood by all parties. This is not an egregious case in which Goldstein should be denied the opportunity for a lifetime to be employed in a field in which he worked for many years.

The Second Circuit indicated in *Beck v. Levering*, 947 F.2d 639, 641 (2d Cir. 1991) that a permanent injunction can only be granted to bar a party from being involved with benefit funds if that party engaged in egregious conduct. In the case at bar, however, the record does not establish that the petitioners engaged in this type of egregious conduct.

In addition, there must be a hearing before a permanent injunction is granted where there are triable issues of fact regarding whether the individual engaged in egregious misconduct. No matter what standard the Second Circuit employed, the Second Circuit failed to examine the record as a whole and draw all reasonable inferences in favor of the petitioners that a permanent injunction was not warranted. As indicated above a permanent injunction was not issued against the Funds's trustees and Local 947 officials. At minimum, a hearing is required in this case on whether a permanent injunction should be issued.

## CONCLUSION

The Supreme Court must grant certiorari. This case raises important issues which must be resolved regarding what constitutes plan assets and whether a person can be found to be a fiduciary in all instances when there is evidence, at most, that he acted as a fiduciary in only some instances. In addition, this case also raises an important issue of when it is appropriate to grant summary judgment. The case further raises the important issue of when it is appropriate to grant a permanent injunction.

Respectfully submitted,

STUART WEINBERGER
GOLDBERG AND WEINBERGER LLP
*Attorneys for Petitioners*
630 Third Avenue
New York, New York 10017
(212) 867-9595